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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 811

MORRELL J. RODDY, PETITIONER

v.

CIVIL AERONAUTICS BOARD AND ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a) is reported at 299 F. 2d 136. The opinions and orders of the Civil Aeronautics Board (R. 28–47, 66–70) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1962 (Pet. App. 3a). Petitions for rehearing and rehearing *en banc* were denied by that court on February 23, 1962 (R. 90–91). The petition for a writ of certiorari was filed on March 23, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the transmission to the Civil Aeronautics Board by the Administrator of the Federal Aviation Agency, during the pendency of petitioner's appeal to the Board from an order of the Administrator revoking all petitioner's pilot licenses, of certain letters requesting oral argument and urging expeditious decision, which were served on petitioner not by the Administrator but by the Board after it received the letters, requires that the Board order affirming the revocation of the licenses be set aside.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Federal Aviation Act and the regulations of the Civil Aeronautics Board are set forth in the Appendix, *infra*, pp. 9–14.

STATEMENT

1. Section 609 of the Federal Aviation Act, 49 U.S.C. 1429 (App., *infra*, pp. 9–10), empowers the Administrator of the Federal Aviation Agency to revoke airman license certificates after investigation when such action is required in the interest of safety. The airman may then appeal to the Civil Aeronautics Board, which is empowered to "amend, modify, or reverse" the Administrator's initial revocation order. On appeal, *de novo* adjudicatory proceedings in which the Administrator acts as prosecutor are held before the Board. The effectiveness of the Administrator's order is stayed pending disposition by the Board except in cases specified by the Administrator to be emergencies. In emergency cases, the initial revocation order continues in effect, and the Board is

required to dispose of the appeal within sixty days.

2. In the present case the Administrator had revoked all certificates issued to petitioner, who in turn appealed to the Board. The evidence at the ensuing hearing showed that petitioner was a Capital Airlines captain, holding both a commercial pilot's certificate and the airline transport pilot certificate which is required of captains (pilots-in-command) of scheduled airline flights. On March 23, 1960, he was in command of a flight from Tampa to Buffalo via Pittsburgh. At Pittsburgh he left the plane and turned the flight over for the Pittsburgh-Buffalo portion to another Capital pilot, Captain MacNeal, who had come aboard merely for transportation between Pittsburgh and Buffalo.[1] The Administrator charged, and the Board's hearing examiner found (see R. 28, 29), that the change of command was without the knowledge or consent of Capital Airlines; that petitioner did not know whether MacNeal was properly qualified to command such a plane, and in fact he was not; and that petitioner had attempted to conceal his act by failing to report the change to Capital, by failing to order his crew to remove his name as captain from the log and flight plan, by failing to obtain or assure the issuance of a new flight dispatch release at Pittsburgh, and by ordering his First Officer to file with Capital at Buffalo a Pilot Pay and Expense Report showing petitioner as Captain during the entire flight.

[1] The Administrator had also revoked all certificates issued to Captain MacNeal, who in turn appealed to the Board. The proceeding against Captain MacNeal ultimately became moot by reason of his death.

The examiner concluded, however, that revocation of petitioner's airline transport pilot certificate would be a sufficient sanction and that petitioner should be permitted to retain his other licenses, thereby permitting him to continue flying as a co-pilot (R. 15–17).[2] Both petitioner and the Administrator appealed to the Board; petitioner challenged the examiner's order revoking his command certificate, while the Administrator objected to the examiner's refusal to revoke petitioner's other licenses.[3]

3. Section 301.46 of the Board's Rules of Practice in Air Safety Proceedings (App., *infra*, p. 11) provides that oral argument ordinarily will not be heard in license revocation proceedings, but permits motions to allow it in exceptional cases. On November 23, 1960, the Administrator's General Counsel, by letter to the Board, requested oral argument (R. 19–20). Two days later, the Administrator sent another letter to the Board (R. 20–21) reiterating the request for argument. The Administrator also stated that emergency orders had not been issued against petitioner because Capital had suspended him, that it appeared that he would soon be in a position to resume flying as a pilot-in-command, and that the Board should therefore proceed expeditiously in the matter.[4]

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[2] Similar findings were made as to Captain MacNeal in the separate proceeding involving him.

[3] Subsequently, the pilots abandoned their appeals from the examiner's revocation of their airline transport pilot licenses; hence they never resumed their prior status as captains (see R. 25–27).

[4] See note 3, *supra*.

Acknowledging receipt of the letters, the Board observed that the letters had not been served on petitioner and took the position that under its Rules of Practice it could not consider such unserved communications (R. 23–24). The Board concluded, however, that any deficiency in the manner in which the letters were transmitted could be cured simply by sending copies thereof to petitioner. It advised the Administrator that copies would be sent and that action on his requests would be deferred until petitioner had had an opportunity to reply.

Copies of the letters were served on petitioner but they elicited no response from him. After oral argument, which had been requested by petitioner as well as by the Administrator, the Board upheld its examiner's revocation of petitioner's command pilot certificate but reversed his refusal to revoke remaining certificates. Petitioner then sought reconsideration of the Board's order, and for the first time objected to the Administrator's letters. He argued (R. 54–56) that they constituted improper *ex parte* efforts to influence the Board's decision of the case in violation of its Principles of Practice (App., *infra*, pp. 11–14).[5] Rejecting this contention (R. 67–70), the Board found that neither in his brief nor in oral argument had petitioner contested the factual assertions made in the letters, that petitioner himself had asked for oral argu-

[5] The Board's Principles of Practice constitute its code of ethics in relation to proceedings before it, and they condemn *ex parte* contacts and attempts to exert pressure or influence. The Administrator denied any attempt or purpose to exert influence on the Board by his letters (R. 58), and his counsel informed the court below in argument that the failure to serve the petitioners with the letters was inadvertent.

ment in his brief to the Board, that petitioner had been given full notice of the letters and ample opportunity to present his position, and that petitioner had failed to show that he had been prejudiced by the Administrator's action. The Board found that nothing in these circumstances would justify it in vitiating the proceeding since the failure of the Administrator to serve copies of the letters on petitioner had had no effect on the Board's disposition of the case or on the procedures it had employed.

4. Petitioner's challenge to the Board's order in the court of appeals was restricted to the single contention that the Administrator's letters to the Board were improper and *per se* vitiated the proceeding. The court of appeals affirmed, "find[ing] no error affecting substantial rights" (Pet. 4a).

ARGUMENT

The decision below plainly presents no question warranting consideration by this Court. Although petitioner suggests (Pet. 4–5) that the Administrator's letters to the Board deprived him of a full and fair hearing, the facts do not substantiate his claim. The Board specifically refused to consider the Administrator's requests until petitioner had had an opportunity—of which he did not choose to avail himself—to reply. Indeed, the Administrator's request for oral argument asked only for what petitioner himself requested of the Board.

Nor was the Administrator guilty of a clandestine approach to the Board, brought to light only through a legislative investigation, as in *Sangamon Valley*

Television Corp. v. *United States*, 358 U.S. 49. Here the fact of the *ex parte* communication was immediately revealed to petitioner by the Board itself, and was a matter of public record. See *North Central Airlines, Inc.* v. *Civil Aeronautics Board*, 265 F. 2d 581, certiorari denied, 360 U.S. 903.[6]

What is involved in the present case is a simple failure to serve petitioner with documents which contained no intrinsically objectionable matter.[7] That failure was completely cured by the Board's transmission of the letters to petitioner and its allowance of an opportunity for him to reply. The court below, which has been alert in dealing with questions of improper influence upon administrative agencies,[8] determined after a full hearing of petitioner's charges that no ground exists for remanding

[6] Petitioner's reliance upon *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, is misplaced. There the Court held only that a party before an administrative tribunal was entitled to prove his allegation that the decision against him had been dictated by the announced views of the tribunal's superior. The position of the Administrator, whose decisions are reviewed by the Board *de novo*, is in no way comparable to that of the Attorney General in *Accardi*.

[7] All but one of the phrases to which petitioner objects (Pet. 4) are from the statute on which the proceeding against petitioner was based; and petitioner has never contended that the substitution of captains was not, as the Administrator conservatively described it, "unauthorized."

[8] See, e.g., *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F.2d 55 (C.A.D.C.); *WKAT, Inc.* v. *Federal Communications Commission*, 258 F.2d 418 (C.A.D.C.); *United Air Lines* v. *Civil Aeronautics Board*, 281 F.2d 53 (C.A.D.C.). In all these cases the court below remanded proceedings to the agencies to explore charges of *ex parte* communications and attempts to exert improper pressures.

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the case because of the *ex parte* letters received by the Board. No reason is apparent for reversing that determination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1962.

APPENDIX

1. Section 609 of the Federal Aviation Act of 1958, 72 Stat. 779, 49 U.S.C. 1429:

> SEC. 609. The Administrator may, from time to time, reinspect any civil aircraft, aircraft, engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the

public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings.

2. Relevant provisions of the Board's Rules of Practice in Air Safety Proceedings, 14 C.F.R. 301.1, *et seq.*:

§ 301.15 Service and filing.

(a) *Petitions for review and appeals.* Petitions for review and appeals may be mailed to the Board and shall be deemed timely if postmarked before the end of the time limitation therefor. The Board will forthwith forward two copies thereof to the Administrator, and will docket petitions and appeals as of the time the copies are received by the Administrator.

(b) *Other pleadings, motions or documents.* All other pleadings, motions or documents, including those on appeal from the examiner's initial decision, shall be served before filing with the Board, by personal service or registered mail. Service by registered mail shall be complete upon mailing to the representative of record of the party to be served in the proceeding, or, if no such representative has entered an appearance, to the last known address of the party. Where no other address has been

furnished, service by mail may be directed to the address last furnished by the petitioner or respondent to the Federal Aviation Agency.

* * * * *

§ 301.46 Briefs and oral argument.

* * * * *

(e) *Oral argument.* Oral argument before the Board will normally not be held in proceedings conducted under this part. However, the Board may permit oral argument when it is specifically requested and a need therefor is shown.

3. Principles of Practice of the Civil Aeronautics Board, 16 F.R. 2932, 14 C.F.R. (1956 ed.) 300.0, *et. seq.*[1]:

Although the standards and principles which usually govern the proceedings of judicial bodies have always been applicable to the Board in the conduct of its quasi-judicial functions, the Board has not previously reduced to written form those principles of practice by which the Board and the persons appearing before it should be governed. In December of 1950 the Board requested a representative committee of industry counsel established as the Civil Aeronautics Board Advisory Committee on Practices and Procedures to assist and to advise it in formulating procedures and practices with respect to proceedings before the Board. As an initial phase in its activity, a statement of rules of conduct which will serve as a guide for all parties and the Board and its staff in relation to proceedings before the Board has been recommended by the Committee and as modified is being adopted and promulgated by the Board as a guide to all parties in relation to matters pending before the Board.

[1] These principles were adopted on March 27, 1951 and were in effect at the time the Administrator's letters were sent to the Board.

In consideration of the foregoing the Civil Aeronautics Board hereby makes and promulgates a new Part 300 to the Board's Procedural Regulations to read as follows, effective March 30, 1951:

PART 300—PRINCIPLES OF PRACTICE OF THE CIVIL AERONAUTICS BOARD

300.0 Applicability of part. The principles of practice set out herein to the extent applicable shall govern the relationships between the Board, its staff, and all other persons.

300.1 Judicial standards of practice. In many respects the functions of the Board are similar to those of a court and parties to cases before it and those who represent such parties are expected to conduct themselves with honor and dignity. By the same token, the members of the Board, and those of its employees who participate with the Board Members in the determination of cases upon a record, are expected to conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. The standing and effectiveness of the Board are in direct relation to its observance, that of its staff, and the parties and attorneys appearing before it, of the highest standards of judicial and professional ethics.

300.2 Hearing cases; improper influence. It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases—

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(b) It is likewise improper that there be any private communication on the merits of the

case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

300.3 Conciseness of presentation. Persons practicing before the Board should endeavor to present their cases in concise form avoiding cumulative and repetitious evidence, since the members of the Board participating in the decision of a case, after notice and hearing and upon a record, must familiarize themselves with the evidence in the record and with the arguments made on behalf of the parties orally and in written briefs, and must base their decision solely on the record.

300.4 Unusual hospitality. It is particularly improper that persons interested in the business of the Board should provide unusual hospitality to the Board or its staff; nor should such hospitality be accepted.

300.5 Attorney-client relationship. Persons practicing or appearing before the Board, whether or not members of the bar, should have due regard for the standards of professional conduct applicable to the lawyer-client relationship and to the relationship between a lawyer and a judicial tribunal.

(a) The nontechnical nature of the Board's procedure calls for special adherence, by practitioners, to scrupulous standards of fairness, candor, and consideration for the rights of others in the pleadings filed, evidence sub-

mitted, conduct of the hearing, and briefs and arguments made. In appearing for a client, the practitioner thereby vouches on his honor that in his opinion the client's cause is one proper for determination, and in presenting pleadings and offering evidence he represents that the same are not offered for unwarranted delay and that in his opinion the content thereof is not misleading. Nor should he indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations.

(b) A practitioner, moreover, should advise his client to observe the law according to his conscientious belief as to its permissible meaning and should use his best efforts to restrain his client from improprieties in dealing with the Board or its staff. If a client persists in such improprieties, the practitioner should terminate their relationship.

300.6 Violations. The Board may disqualify and deny temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found after hearing by the Board to have engaged in unethical or improper professional conduct. Violation of any of the foregoing principles shall be deemed to be such conduct.

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